APR 4 1972

IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1267

DALE S. COENEN,

Petitioner,

against

R. W. PRESSPRICH & CO., INC., and STIRLING HOMEX CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this action on February 16, 1972, which affirmed an order of the United States District Court for the Southern District of New York. This judgment in effect dismissed the claims under the federal antitrust laws and securities laws that petitioner asserted against defendant-respondent, R. W. Pressprich & Co. ("Pressprich"), and ordered that all claims of any nature whatsoever that petitioner had against Pressprich be arbitrated.

Citations to Opinions and Orders Below.

The unreported order and opinion of the District Court granting the motion of respondent Pressprich for a stay of the action against it pending arbitration is printed as Appendix B, page 5a. The unreported order and opinion of the District Court adhering to

its original determination on reargument is printed as Appendix C, page 9a.

The unreported opinion and judgment of the Court of Appeals is printed as Appendices D and E, respectively, page 10a and page 23a. A petition for rehearing *en banc*, which was also treated by the Court of Appeals as a petition for reharing, was denied on February 7, 1972, with three of the then seven active judges in the Second Circuit dissenting. The orders denying the petition are reprinted as Appendices F and G, respectively, page 25a and page 26a.

Jurisdiction.

The jurisdiction of this court is invoked pursuant to 28 U. S. C. §1254(1). The judgment of the Court of Appeals was entered on February 16, 1972. The orders denying the petition for rehearing were entered on February 7, 1972.

Questions Presented.

1. Whether the ruling by the Court of Appeals that an arbitration clause in a stock exchange constitution deprived the federal courts of jurisdiction to try an action for treble damages under the federal antitrust laws raises an important federal question in a way which conflicts with the applicable decisions of this Court?

2. Whether the ruling by the Court of Appeals that an arbitration clause of a stock exchange ousted the federal courts of jurisdiction to adjudicate a claim held by an individual investor for market manipulation under §10b of the Securities Exchange Act of 1934 raises an

important federal question in a way which conflicts with the applicable decisions of this Court?

3. Is it against public policy inherent in the antitrust laws for a stock exchange and its present members to require as a condition precedent for membership that any applicant forego all rights under the federal antitrust and securities laws which he then holds as an individual against members of the exchange?

Constitutional Provisions, Statutes and Federal Rules Involved.

Involved here are §§ 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2); §4 of the Clayton Act (15 U. S. C. §15); and §§ 10(b), 27, 28B and 29A of the Securities Exchange Act of 1934 (15 U. S. C. §§ 78j[b], 78aa, 78bb[b] and 78cc[a]); the texts of which, insofar as pertinent here, are printed as Appendix A, page 1a.

Statement of the Case.

Facts Giving Rise to the Action.

In the District Court petitioner Coenen filed a complaint against Pressprich, a brokerage house, and Stirling Homex Corporation ("Stirling") for conspiring to deny Coenen access to the over-the-counter market for selling 90,000 shares of Stirling Homex stock owned by Coenen as an individual investor. Jurisdiction was based upon diversity of citizenship.

In essence, what Coenen charged in the detailed allegations of his complaint, printed as Appendix II, page 27a, was that during the summer of 1970 when the stock market was in a severe decline, Pressprich, an underwriter of the Stirling Homex stock and the prin-

cipal broker maintaining the over-the-counter market of the stock, combined and conspired with the issuer of the stock, Stirling, to prevent Coenen from selling his 90,000 shares on the market. They accomplished this by refusing to transfer Coenen's shares unless and until he agreed to sell all of these shares off the market in a private placement at a price of less than one half of the then over-the-counter market price, or a difference to Coenen of about $1,600,000.

On December 31, 1970, after the sale complained of, the company of which Coenen is the principal stockholder, Coenen & Co., Inc. (then an over-the-counter brokerage firm), became a member of the New York Stock Exchange ("Exchange"). The Exchange has a constitution which gives any member the right to have arbitrated "any controversy" that it may have with any other member. Pressprich, in addition to being an over-the-counter house, also belonged to the Stock Exchange. Pressprich demanded that the entire action, including the claim for treble damages under the federal anti-trust laws and for violation of the Securities Exchange Act, be submitted to arbitration.

The Opinions Below.

The Second Circuit, with three out of the then seven active circuit judges dissenting, has ruled that the broad arbitration clause of the Exchange constitution in effect afforded Pressprich immunity from concededly valid claims for damages under Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and under Section 10b, 15 U. S. C. §78j(b), of the Securities Exchange Act of 1934.

In an effort to soften the revolutionary impact of its ruling, the Second Circuit attempted to ridicule the antitrust claim, stating that it consists only of "perfunctory and formal allegations" made to "give the illusion of a triple-damage antitrust claim" (Appendix D, p. 22a). With all due deference to the Second Circuit, however, these allegations are classic examples of the most flagrant types of *per se* antitrust violations. The boycott charged here is no different than one where a manufacturer and distributor of an article combine and conspire to prevent another potential seller from entering the market for the purpose of maintaining the price on that article. Such conduct combines the two most notorious offenses proscribed under Section 1, a concerted refusal to deal and price fixing. Here the issuer of the stock, Stirling, and the maker of the market, Pressprich, engaged in precisely these types of misconduct.

The District Court and the Court of Appeals, in dismissing the federal antitrust and securities claims against Pressprich, held either that these claims were actually arbitrable, or else, in effect, held that Coenen released his claims under federal antitrust and securities laws against Pressprich when his company joined the Exchange after the dispute arose and agreed to the broad arbitration provisions of the Exchange's constitution. Each of these alternative interpretations is flatly contrary to existing law, as announced by all U. S. Courts of Appeals and this Court.

In effect what the Second Circuit has done here, for the first time in the history of the antitrust laws, is to hold that the vital public interest in the private enforcement of these laws is subservient to the interest of a stock exchange in settling disputes between

its members within the private confines of arbitration before members of that exchange.

As to the antitrust claim, both the District Court and the Court of Appeals held the treble damage claim arbitrable on the sole ground that the agreement to arbitrate was made after the dispute arose. It is submitted that this distinction does not justify revoking all prior existing decisions holding that antitrust claims are not arbitrable.

Both courts also held the Securities Exchange Act claim arbitrable because Coenen became bound by the Exchange's arbitration clause after the dispute had arisen, and hence that the rationale of *Wilko v. Swan*, 346 U. S. 427 (1953), which held that Section 14 of the Securities Act of 1933 (15 U. S. C. Section 77i, which is virtually identical to Section 29[a] of the 1934 Act) made an agreement to arbitrate a claim arising under the 1933 Act unenforceable, was not applicable. The Court of Appeals also reasoned that the non-waiver provisions of the Act are for the protection of investors and do not apply to disputes between members. Moreover, it stated that the arbitration clause of the Exchange is the kind of self-regulatory provision called for by Section 28(b) of the 1934 Act, and thus is an exception to the non-waiver provisions of Section 29(a) of the Act.

The court ignored the fact that Section 28(b) is limited to disputes between broker-dealers arising out of the transaction of their brokerage business. Moreover, the court's holding that the waiver provisions of Section 29(a) are not applicable squarely raises the question of whether or not a national stock exchange may lawfully require an applicant to waive his claims under the federal securities laws (as well as the federal

antitrust laws) as a condition precedent to membership. Previous decisions of this Court indicate such a condition precedent is against public policy.

Reasons for Granting the Writ.

POINT I.

Exclusive jurisdiction to adjudicate claims for treble damages under the antitrust laws is vested in the federal courts. Section 4 of the Clayton Act, 15 U. S. C. §15, provides in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained * * *"

The vital importance of preventing judicial erosion of Section 4 of the Clayton Act produced a sharp schism in the court below. Three of the seven then active circuit judges of the Second Circuit voted to grant the petition by Coenen for a rehearing *en banc*. In that petition Coenen urged that the full bench should correct the revolutionary ruling of the three-judge panel that heard the case.

This Court has also recently recognized the importance of a proper delineation of the scope of Section 4 of the Clayton Act in its granting of the petition for certiorari in *Ricci v. Chicago Mercantile Exchange*, 447 F. 2d 713 (7th Cir. 1971), *cert. granted*, 40 U. S. L. W. 3415 (1972). In that case this Court agreed to review the question of whether under Section 4 of the Clayton Act the dis-

trict court has sole jurisdiction over a private antitrust treble damage action involving a commodities market, where there is no statutory exemption from the antitrust laws. The question presented by this case is substantially similar.

Prior to this case it was assumed virtually without discussion that only federal district courts had jurisdiction to try treble damage actions under Section 4 of the Clayton Act. *E.g., Freeman v. Bee Machine Co.*, 319 U. S. 448, 451, fn. 6 (1943); *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436, 440 (1920); *Trans World Airlines, Inc. v. Hughes*, 332 F. 2d 602 (2d Cir. 1964) *petition for cert. dismissed*, 380 U. S. 248-49 (1965); *Banana Distributors, Inc. v. United Fruit Co.*, 269 F. 2d 790, 793 (2d Cir. 1959).

Not only does the Second Circuit's opinion constitute a judicial repeal of Section 4 of the Clayton Act, but it also represents an undisguised attempt to abrogate the broad holding of this Court, repeatedly enunciated, that private enforcement of the antitrust laws is an important and vital part of the judicial machinery for carrying out the policies articulated by Congress in the Sherman and Clayton Acts. One of the most forceful formulations of this policy was set forth by this Court in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U. S. 311, 317-18 (1965), and recently repeated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U. S. 321, 336 (1971), where the Court noted that Congress believed "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."

Here the Second Circuit, while conceding the illegality of submitting to arbitration antitrust claims arising sub-

sequent to Coenen's joining the Exchange, purported to find an intent by Coenen to submit his federal antitrust claim to arbitration solely from the fact that the agreement to arbitrate was made after the dispute arose. A finding of such intent merely begs the question.* Coenen only agreed to arbitrate any claim that was arbitrable. If the federal antitrust claim for treble damages is arbitrable, then he agreed to arbitrate it; if it is not, then he did not so agree.

Imputing such an intent to Coenen in effect charges him with anticipating that the Court of Appeals would hold that Section 4 of the Clayton Act no longer means what it says, and that the court would overrule established decision law and hold that arbitrators can adjudicate antitrust actions. Coenen was entitled to rely upon the prior ruling of the Second Circuit in *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F. 2d 821 (2d Cir. 1968), holding that arbitrators cannot determine antitrust claims. In arriving at this result, that court stated (pp. 826-828):

> "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest * * * We do not believe that Congress intended such claims to be resolved elsewhere than in the courts * * *"
>
> * * *
>
> "* * * We conclude only that the pervasive public interest in enforcement of the antitrust

*No evidence was presented extrinsic to Coenen's joining the Exchange and becoming bound by its constitution to establish a specific intent by Coenen to arbitrate the antitrust claim.

> laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear. In some situations Congress has allowed parties to obtain the advantages of arbitration if they 'are willing to accept less certainty of legally correct adjustments,' see id., but we do not think that this is one of them. In short, we conclude that the antitrust claims raised here are inappropriate for arbitration."

The reason advanced by the Second Circuit for its revolutionary result in this case is that the antitrust claim "is precisely the sort of breeder of ill-feeling between members of the Exchange it was intended to keep out of the courts" (Appendix D, p. 22a).

This desire to soothe the ruffled feelings of members of the New York Stock Exchange, laudable as it may be, can hardly be justification for the Second Circuit's *pro tanto* repeal of Section 4 of the Clayton Act. Indeed, its prior opinion in the *American Safety Equipment* case would seem to prevent such a result. There it stated (391 F. 2d at 827):

> "Moreover, it is the business community generally that is regulated by the antitrust laws. Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest * * *"

This consideration is of particular importance here. Exchange arbitrators are either officers or partners of member firms. Many of these firms, as well as the Exchange itself, have been deeply opposed to the application of antitrust principles in any form to the securities business. The Stock Exchange, until quite recently, had

a fixed fee schedule with a flat prohibition against rebate of commissions.*

The reasons why Pressprich is so eager to defend these charges before a tribunal composed of fellow stockbrokers with non-reviewable powers, both as to the law and facts, are precisely the same reasons why the courts have jealously guarded the rights of recourse to a federal court for a party injured through antitrust violations.

Moreover, the reason advanced by the Second Circuit for reaching the result here, namely preventing ill-will among stockbrokers, applies equally, and even with stronger force, to a dispute that arises *after* both parties thereto have become members of the Exchange, a situation in which the arbitration clause concededly does not bar the antitrust claim. *E.g., American Safety Equipment Corp., supra.*

Furthermore, it is difficult to understand how an antitrust claim that is totally unrelated to the business of either party on the Exchange, that does not involve a stock traded on the Exchange, and that arose before one of the parties thereto became a member of the Exchange, could be said to breed more ill-will than one that arose subsequent to both parties becoming members.

No self-regulatory grant given to a stock exchange under the Securities Act can justify depriving a plaintiff of his federal rights in a matter unrelated to the exchange's business. The exemption given to stock ex-

*This anti-rebate rule was held to be subject to the application of the antitrust laws in *Thill Securities Corp. v. New York Stock Exchange*, 433 F. 2d 264 (7th Cir. 1970), *cert denied*, 401 U. S. 994 (1971).

changes from the anti-trust laws is exceedingly narrow. In *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963), this Court, after noting that the Securities Act contains no express exemption from the antitrust laws, went on to hold that such exemptions are to be "implied only if necessary to make the Securities Exchange Act work, and even then to the minimum extent necessary." *Id.* at page 357.

No legitimate purpose of any exchange would be served by allowing a member of the exchange to conspire with impunity to rig a market in a stock not even traded on the exchange in violation of the antitrust laws just because the person against whom the conspiracy is directed subsequently joins the same exchange. Granting such exemption would defeat the purpose of the treble damage provision in the Clayton Act—deterrence of those who would conspire to restrain trade.

The other possible interpretation of the Court of Appeals' opinion is that by agreeing to arbitrate all disputes between members, Coenen somehow released his rights under the federal antitrust laws against Pressprich. Such a holding is flatly at odds with *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U. S. 321, 347 (1971). There again, because of the public interest in vigorous private enforcement of antitrust laws, it was held that the release of a joint tort-feasor in an antitrust conspiracy to be effective must be done in clear and explicit language which reveals that the releasor actually intended to give up his rights under the federal antitrust laws against that particular joint tort-feasor.

It is the height of legal fiction to hold that agreeing to the terms of a trade association constitution requiring arbitration of all disputes between its members

evinces a specific attempt to relinquish rights that can be asserted only in a federal court. Again, such an intent could only be inferred if antitrust claims for treble damages are actually arbitrable and were known to be so when Coenen joined the Exchange.

The Second Circuit noted that "a claimant is not required to sue and is always free to settle a private triple-damage antitrust case." (Appendix D, p. 21a-22a). But from this it does not follow, as the Court of Appeals held, that "his agreement to arbitrate is in effect an agreement to settle the [antitrust] dispute" (Appendix D, p. 22a). The court cites no authority for this remarkable conclusion, and we know of none.

The court's statement that here "the agreement to arbitrate may be regarded as an agreement to arbitrate a specific existing dispute" is also without support. If this were correct, then joining the Exchange could equally be regarded as an agreement to arbitrate all future antitrust claims, which is contrary to the holding of the *American Safety Equipment* case, *supra*. The broad arbitration clause of the Exchange, applicable to all members, can in no sense be read as an agreed upon submission by Coenen and Pressprich of the specific dispute between them which had already accrued.

Where the rights given to a claimant under federal law are bottomed upon important and basic public policy considerations, an agreement to relinquish those rights by submission to arbitration, prior to this case, could only be found by "a clear, explicit statement" to submit the specific claim to arbitration. *Old Dutch Farms, Inc. v. Milk Drivers & Dairy Emp. Local 584*, 359 F. 2d

598, 603 (2d Cir. 1966), *cert. denied*, 385 U. S. 832 (1966).*

The Second Circuit keyed its revolutionary ruling upon the fact that "the agreement to arbitrate was made after the dispute arose" (Appendix D, p. 21a). Without offering any explanation therefor it regarded this fact and this fact alone as creating an "exception to the general rule * * * that antitrust claims are not proper subjects for arbitration" (Appendix D, p. 21a). There is no sound public policy reason for the creation of such an exception, and the attempt of the Second Circuit to do so raises an important federal question which directly conflicts with all prior decisions of this Court and all Courts of Appeals.

POINT II.

Turning to the claim under Section 10(b) of the Securities Exchange Act of 1934, Section 29(a) of this Act voids agreements to arbitrate disputes between the parties arising under the 1934 Act. This section reads as follows:

> "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

The Court of Appeals stripped Coenen of his rights under this law by ruling that there was an implied provision in this section limiting it to agreements to arbitrate future controversies. As with the antitrust claim,

*In that case, unlike the present one, concededly the arbitrators would have had jurisdiction to adjudicate the claim if the parties had agreed to submit the claim to it.

no sound reason can justify creating an exception for existing disputes. Here again this ruling was based upon the court's tortured interpretation that the broad non-specific arbitration clause of the Exchange covers a specific prior securities violation which is unconnected with the Exchange business of either party and which was never the subject of a specific submission by the parties.

Section 28(b) of the 1934 Act, exempting from the coverage of the 1934 Act "any action taken by the authorities of [the Exchange] to settle disputes between its members," does not authorize arbitration of petitioner's 10(b) claim. As pointed out in *Brown v. Gilligan, Will & Co.*, 287 F. Supp. 766, 775 (S.D.N.Y. 1968), this exemption is limited to disputes between broker-dealers arising out of the transaction of their brokerage business. Here, it is indisputable that Coenen effected the sale in his capacity as an individual investor; the sale involved a stock that has never been traded on the Exchange; and Pressprich's illegal activity in rigging the market of the Stirling stock was directed against Coenen in his capacity as an individual investor. Consequently, this dispute is not exempt from the coverage of the 1934 Act.

POINT III.

The Court of Appeals' ruling raises the question of whether or not an exchange may lawfully require an applicant to waive his claims under the securities laws and antitrust laws as a condition precedent to membership. The opinion of this Court in *Wilko v. Swan*, 346 U. S. 427 (1953), indicates that an exchange may not exact such a condition.

Wilko v. Swan, involving a suit under the Securities Act of 1933 and Section 14 thereof which is virtually identical to Section 29(a) of the 1934 Act, struck down a brokerage agreement requiring a customer to arbitrate any claims he had relating to security transactions with brokers. Although that case dealt with a controversy which arose after the making of the agreement and explicitly noted this fact, it is submitted that no reasons exist for reaching a contrary result in the situation presented in the instant case. Without entering into an extended discussion of the illegality *per se* of tying clauses (see, *e. g., Northern Pacific Ry. Co. v. United States,* 356 U. S. 1 [1958]), it seems hardly open to question that the New York Stock Exchange and its members cannot enter into a scheme whereby they will refuse to permit applicants to join the Exchange unless and until those applicants give up their rights to seek court redress for violations of the federal securities laws and antitrust laws perpetrated by existing members.

The self-regulatory grant provided by Section 28(b)* cannot be used to justify such a blatantly illegal agreement. Consequently, even if Coenen had actually agreed to such a scheme illegal *per se* under the antitrust laws, he could not have been foreclosed from subsequently asserting his rights under federal laws. *Perma Mufflers v. International Parts Corp.,* 392 U. S. 134 (1968).

We respectfully submit that the Second Circuit's construction of the Exchange's arbitration clause is not only contrary to all existing decisions, but also emasculates Section 29(a) of the 1934 Act and Section 4 of the Clayton Act. It places a judicial imprimatur of approval on an exclusionary scheme of membership to an

*The 1933 Act does not contain a similar provision.

exchange that is in and of itself a *per se* violation of Section 1 of the Sherman Act. It is difficult to imagine a result more in conflict with the congressional mandates inherent in the federal securities and antitrust laws and the liberal judicial implementation of those mandates.

The ruling is a *de facto* acquittal of one of two co-conspirators charged to have committed serious offenses under federal laws. If the decision is allowed to stand, it will result in a serious blow to the enforcement of these federal laws. In essence, the decision permits the federal district courts to abrogate their responsibility for enforcing these laws to private arbitrators, which can mean no enforcement at all. Such a result is directly at odds with the rationale of the prior decisions of this Court, and if allowed to stand will inevitably come back to plague this Court in future cases involving attempts by trade associations and others to frustrate enforcement of important federal laws by requiring arbitration of "any controversy" between members.

CONCLUSION.

In summary, this case presents a unique opportunity to settle once and for all the simple but extremely important question of whether enforcement of rights given to an aggrieved person under the federal antitrust and securities laws are paramount or subservient to the policy of enforcing broad arbitration clauses to their fullest extent. This court's holding in *Wilko v. Swan*, 346 U. S. 427 (1953), that such arbitration clauses could not be used to oust federal courts of their jurisdiction over violations of federal securities laws was explicitly confined to disputes that arose subsequent to the making of the agreement to arbitrate all disputes.

What the Second Circuit has done here is to seize upon this limitation as a basis for holding that broad arbitration clauses can and should wipe out rights previously accrued under the federal antitrust and securities laws. If this erosion is proper, this Court should so hold. If not, we submit that it has the duty as the ultimate repository of effective judicial machinery for enforcing such laws to prevent it.

For the foregoing reasons we respectfully request that the writ of certiorari be granted.

Respectfully submitted,

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Appendices to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX A

Statutes Involved

Section 1 of the Sherman Act

15 U.S.C. §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or be-

tween retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act

15 U.S.C. §2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act

15 U.S.C. §15

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Appendix A

Section 10b of the Securities Exchange Act of 1934

15 U.S.C. §78j(b)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 27 of the Securities Exchange Act of 1934

15 U.S.C. §78aa

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant

or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

Section 28B of the Securities Exchange Act of 1934

15 U.S.C. §78bb(b)

(b) Nothing in this chapter shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, or (3) with regard to the binding effect on any such member of any disciplinary action taken by the authorities of the exchange as a result of violation of any rule of the exchange, insofar as the action taken is not inconsistent with the provisions of this chapter or the rules and regulations thereunder.

Section 29A of the Securities Exchange Act of 1934

15 U.S.C. §78cc(a)

(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

APPENDIX B

Order and Opinion of the District Court Staying all Proceedings Against Defendant R. W. Pressprich & Co., Inc., Pending Arbitration

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

DALE S. COENEN,

Plaintiff,

against

R. W. PRESSPRICH & CO., Inc. and STIRLING HOMEX CORPORATION,

Defendants.

71 Civ. 724

METZNER, D. J.:

Defendant R. W. Pressprich & Co., Inc., moves to stay all proceedings in this action pending arbitration of the disputes between the parties.

Plaintiff is the principal stockholder of Coenen & Co., Inc., a broker-dealer and investment banking firm. During the period from July 1968 to July 1969 he was a member of the board of directors of defendant Stirling Homex Corporation, and personally purchased 90,000 shares of its stock. The certificates contained the standard restrictive "investment" legend.

Sometime during the summer of 1970 the subject matter of this lawsuit came into being. The dispute revolves around the refusal of Stirling, with the claimed connivance of Pressprich, to permit the plaintiff to transfer his

stock free of the restrictive legend. Subsequently the legend was removed, but only in connection with an alleged fraudulent scheme which forced the plaintiff on September 25, 1970 to sell the stock at what he claims was an unconscionably low price.

As far as can be ascertained from the papers, there was no indication until January 6, 1971 that plaintiff intended to assert a claim for damages. On that date the attorney for the plaintiff sent a letter to Pressprich. It contained a copy of the complaint which counsel had been instructed by plaintiff to file against the defendants and asked if there was any possibility of settling the matter.

On December 31, 1970 plaintiff had become an allied member of the New York Stock Exchange. Pressprich is a member of the Exchange.

Membership in the Exchange embraces a pledge to abide by its constitution. Article VIII, §1, of that document provides in part:

> "Any controversy between parties who are members, allied members, member firms or member corporations shall, at the instance of any such party, . . . be submitted for arbitration, in accordance with the provisions of the Constitution and the rules of the Board of Governors."

It has been held that a claim by one member that he has been libeled by another is an arbitrable "controversy" under this provision. *Osborne & Thurlow v. Hirsch & Co.*, 10 Misc. 2d 225, 172 N. Y. S. 2d 522 (1958). In that case the claimed libel occurred while plaintiff was a member of the Exchange, but the action was instituted after he resigned from the organization.

The issue here is whether the contractual agreement, evidenced by membership in the Exchange (*Garfield & Co. v. Wiest*, 432 F. 2d 849 (2d Cir. 1970), *cert denied*, 39 U.S.L.W. 3375 [March 2, 1971]), is applicable where the claimed cause of action arose before the plaintiff be-

came a member, but the first attempt to enforce any rights was made after he became a member.

It appears to me that a person aware of possible claims against another is bound by any subsequent agreement to arbitrate disputes between them which is knowingly entered into. It is obvious from the papers that plaintiff is a sophisticated person and clearly understood his responsibilities when he applied for membership. Furthermore, his claim grows out of a series of circumstances in which he was personally involved. I do not have to reach the question of what the law would be if the complaint had been filed before plaintiff became an allied member of the Exchange.

Consequently, it is clear that the first cause of action either at common law or under the Uniform Commercial Code presents arbitrable issues under the constitution of the Exchange.

Plaintiff's second cause of action arises under §10(b) of the Securities Exchange Act of 1934. §29(a) of this Act renders void certain agreements to arbitrate disputes between the parties arising under the 1934 Act. *Wilko v. Swan*, 346 U. S. 427 (1953). *Wilko* dealt with §14 of the Securities Act of 1933, but the language of §14 is virtually identical to the language of §29(a).

In the *Wilko* case the Court expressly limited its holding to agreements to arbitrate entered into prior to the existence of a controversy. If left open the question presented by the instant claim.

In *Pearlstein v. Scudder & German*, 429 F. 2d 1136, 1143 (2d Cir. 1970), the court indicated that a contract to arbitrate, knowingly entered into after an active controversy has arisen, is enforceable. See also *Moran v. Paine, Webber, Jackson & Curtis*, 389 F. 2d 242 (3d Cir. 1968).

Such a contract is compatible with the purpose of protecting the public inherent in the 1934 Act. It is not rendered void by §29(a). The second claim is subject

to the arbitration clause in the constitution of the Exchange.

Plaintiff's third claim is that defendants conspired to restrain and monopolize trade in the market of the common stock of Stirling. §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

It is clear that antitrust claims are not ordinarily issues for arbitration. The wrong sought to be corrected is of national interest in a free economy and does not merely constitute the violation of an individual's rights. *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F. 2d 821, 826 (2d Cir. 1968). Provisions for submission to arbitration, in the very same contract that gave rise to the antitrust claim, have been uniformly held unenforceable. *Power Replacements, Inc., v. Air Preheater Co.*, 426 F. 2d 980 (9th Cir. 1970); *American Safety Equipment Corp., supra.*

But none of these decisions involve arbitration of a securities dispute that arose before the arbitration agreement was signed. In *American Safety Equipment Corp., supra*, at 827, the court specifically stated that, ". . . we do not deal here with an agreement to arbitrate made after a controversy has already arisen. [Citing *Wilko*]."

Submission to arbitration is comparable to settlement if the claim arose before the arbitration agreement was signed. *Power Replacements, Inc., supra*, at 984. In such situations the rights of the parties are fixed and not subject to economic pressure and unequal bargaining power. Arbitration and Antitrust Enforcement, 44 N.Y.U.L. Rev. 1072, 1079-80 & n. 31 (1969). In the present case the plaintiff knew before he became a member of the Exchange that he had a possible claim against the defendant. Plaintiff's antitrust claim is therefore arbitrable.

Motion granted. So ordered.

Dated: New York, N. Y.
April 22, 1971

CHARLES M. METZNER
U. S. D. J.

APPENDIX C

Order and Opinion of the District Court Adhering to its Original Determination on Reargument

Coenen v. R. W. Pressprich & Co., 71 Civ. 724

Plaintiff seeks reargument of the order of this court staying the prosecution of his action against defendant R. W. Pressprich & Co., Inc., pending arbitration.

It is fundamental, of course, that reargument can only be had on the papers submitted on the original motion to stay the action. In this instance, that motion was brought by Pressprich, and the court's opinion and order dealt solely with its rights. After reviewing the papers, I am of the opinion that the original determination is correct.

Insofar as the other defendant may be frustrating plaintiff's discovery by its interpretation of the court's order, that presents a matter not cognizable on this reargument. Plaintiff is free to avail himself of the provisions of the rules to test the rights of that defendant in the circumstances.

Motion for reargument granted. Upon reargument the original determination is adhered to.

So ordered.

Dated: New York, N. Y.
June 7, 1971

CHARLES M. METZNER
U. S. D. J.

APPENDIX D

Opinion of the United States Court of Appeals for the Second Circuit Affirming the Order of the District Court

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 153—September Term, 1971.

(Submitted October 20, 1971 Decided January 12, 1972.)

Docket No. 71-1714

DALE S. COENEN,

Plaintiff-Appellant,

against

R. W. PRESSPRICH & Co., Inc.,

Defendant-Appellee,

and

STIRLING HOMEX CORPORATION,

Defendant.

Before:

Medina, Mansfield and Mulligan,
Circuit Judges.

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MEDINA, *Circuit Judge:*

The question raised by this appeal is the applicability of the arbitration clause contained in the New York Stock Exchange Constitution to a claim which: (1) arose before the plaintiff joined the Stock Exchange; (2) alleges violation of the Securities Exchange Act of 1934; and (3) alleges violation of the Sherman and Clayton Acts. For the reasons that follow we hold that such a claim is subject to arbitration.

In 1968, while a director of Stirling Homex Corporation, Dale S. Coenen purchased 90,000 shares of Stirling Homex stock for investment purposes. The stock certificates bore the standard restriction against transfer unless the shares were registered, or unless Stirling was furnished with an opinion of counsel satisfactory to Stirling, to the effect that such registration was not required. In the Spring of 1970 Coenen, needing capital, desired to sell a substantial portion of the 90,000 shares. He contacted R. W. Pressprich & Co. and asked them to handle the sale of the shares. The sale took place on September 25, 1970.

In November, 1970, Coenen & Co., a brokerage house of which Coenen is an officer, applied for membership in the New York Stock Exchange. The application was approved and Coenen & Co. became a member of the Exchange on December 31, 1970. As an officer, Coenen automatically became an allied member.

On January 6, 1971 Coenen's counsel sent Pressprich a copy of a complaint that Coenen was going to file against Pressprich and Stirling, and asked if there was any chance of settlement. The complaint alleged that Pressprich and Stirling conspired to force Coenen into selling the Stirling stock at an unconscionably low price by refusing to allow the transfer of the shares free of the restrictive legend until the low price was agreed upon. Coenen's complaint asserted three causes of action: one arising under the common law and the Uniform Commercial Code; another

arising under the Securities Exchange Act of 1934; and the third arising under the Sherman and Clayton Acts.

On February 16, 1971, Pressprich demanded, in writing, that the controversy be submitted to arbitration in accordance with the Constitution of the New York Stock Exchange. Coenen replied by commencing the present action, in the United States District Court for the Southern District of New York, on February 18, 1971. Pressprich moved to stay the action, pending arbitration, on March 19, 1971. The motion was granted by Judge Metzner, ruling that by agreeing to abide by the Rules and Constitution of the Stock Exchange, Coenen agreed to submit "any controversy" with a member firm to arbitration, and that this controversy is a proper one for arbitration. Reported in CCH Fed. Sec. L. Rep. ¶93,014, April 22, 1971. For the reasons that follow, we agree with this conclusion.

I

Coenen Agreed to Arbitrate

A

We turn our attention first to the question of whether Coenen agreed to arbitrate. This issue is governed by federal law by virtue of the Arbitration Act, Title 9 of the United States Code.

Section 2 of the Act, 9 U.S.C. Section 2 (1970), makes enforceable all arbitration agreements concerning transactions relating to commerce. Section 3 of the Act, 9 U.S.C. Section 3 (1970), authorizes a Federal District Court to stay proceedings pending arbitration when there is an arbitration agreement that is validated by Section 2. The sale of securities here constitutes a transaction relating to commerce for the purposes of the Arbitration Act. Once a dispute is covered by the Act, federal law applies to all questions of interpretation, construction, validity, revoca-

bility, and enforceability. *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, dismissed under Rule 60 364 U.S. 801 (1960).

Article VIII, Section 1 of the New York Stock Exchange Constitution provides:

> Any controversy between parties who are members, allied members, member firms or member corporations shall, at the instance of any such party, and any controversy between a non-member and a member or allied member or member firm or member corporation arising out of the business of such member, allied member, member firm or member corporation, • • • shall, at the instance of such non-member, be submitted for arbitration, in accordance with the provisions of the Constitution and the rules of the Board of Governors.

An examination of the applicable federal law on the subject convinces us that Coenen is bound by these terms.

> The constitution and rules of a stock exchange constitute a contract between all members of the exchange with each other and with the exchange itself • • •.
>
> Since the rules of the Exchange "constitute a contract between the members, the arbitration provisions which they embody have contractual validity." • • • The Exchange provisions requiring arbitration constitute an agreement to arbitrate which is binding upon both [parties].

Brown v. Gilligan, Will & Co., 287 F. Supp. 766, 769-70 (S.D.N.Y. 1968). See also *Axelrod & Co v. Kordich, Victor & Neufeld*, 1971 Slip Op. 99, 103 (2d Cir. 10/18/71).

Coenen, moreover, signed a pledge, in his application for membership, that he would "abide by the Constitution [of the Exchange] as the same has been or shall be from

time to time amended, and by all rules adopted pursuant to the Constitution * * *." Accordingly, we have no doubt that Coenen agreed to arbitrate.

In thus agreeing to arbitrate "[a]ny controversy between * * * members * * *," did Coenen agree to arbitrate the present dispute with Pressprich?

"The issue of arbitrability, i.e., whether a particular dispute is covered by an arbitration clause, being a question of 'interpretation and construction,'" is governed by federal law. *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F. 2d 382, 385 (2d Cir. 1961). In deciding the question of arbitrability, the "federal policy [is] to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve doubts in favor of arbitration * * *." *Metro Industrial Painting Corp. v. Terminal Construction Co., supra*, 287 F. 2d 382, 385 (2d Cir. 1961). With this liberal federal policy in mind, we turn to an examination of the clause at issue in this case.

The drafters of the New York Stock Exchange arbitration clause intended it to be very broad. This is evident when it is compared to the Stock Exchange provision governing the arbitration of disputes between a member and a non-member, which must arise out of the business of the member. The purpose behind the drafting of such a broad arbitration clause was, as much as possible, to keep disputes between members out of the courts. This policy is entirely consistent with the congressional grant of power to Stock Exchanges to govern themselves, contained in the Securities Exchange Act of 1934. See *Axelrod & Co., v. Kordich, Victor & Neufeld, supra*, 1971 Slip Op. 99, 102 (2d Cir. 10/18/71); *Brown v. Gilligan, Will & Co., supra*, 287 F. Supp. 766, 773 (S.D.N.Y. 1968) To hold that the present dispute is not arbitrable would frustrate this policy by making two Stock Exchange members settle their dispute in court In fact, we see no substantial difference

between this case and the countless others where parties have agreed to arbitrate an existing controversy. Coenen agreed to arbitrate "[a]ny controversy between • • • members • • •," with full knowledge that he had a claim against Pressprich and that Pressprich was a Stock Exchange member.

One desiring the benefits of membership in the New York Stock Exchange must be willing to live up to the responsibilities of such membership.

B

Coenen's argument that the New York Stock Exchange arbitration clause only applies to "future" disputes that arise after both parties have become members of the Exchange need not detain us long. As an implementation of the statutory policy of self-regulation, we think the clause is clear on its face. It reads "any controversy" between members. And that is precisely what it must mean if controversies between members are to be kept out of the courts. Had those who drafted the clause intended otherwise they doubtless would have used language plainly stating that "any future controversy" or any controversy between members "arising after both parties to the dispute have become" members. Moreover, the two clauses referring to disputes between members and disputes between members and non-members must be read together. In the one clause the reference is to "any controversy," and in the other the reference is to any controversy "arising out of the business of such member." The purpose of each clause is to keep "any controversy" between members and any controversy "between members and non-members • • • arising out of the business of such member" out of the courts. This purpose would be frustrated and in effect nullified if we were to construe such clause as applicable only to "future" disputes.

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II

The Section 10(b) Claim

Coenen also contends that because one of his claims for relief is based upon an alleged violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78j(b) (1970), the claim is not arbitrable. To support this assertion, he relies upon Section 29(a) of the 1934 Act, 15 U.S.C. Section 78cc(a) (1970), which voids any provision for waiver of statutory rights.

The Supreme Court, in *Wilko v. Swan*, 346 U. S. 427 (1953), held that Section 14 of the 1933 Act, 15 U.S.C. Section 77n (1970) (which is virtually identical to Section 29(a) of the 1934 Act) made an agreement to arbitrate a claim arising under the 1933 Act unenforceable. The rationale of the decision was that the agreement was made before the existence of any controversy, thus restricting plaintiff in his choice of forum before there was any dispute. "While the Securities Act does not require a petitioner to sue, a waiver in advance of a controversy stands upon a different footing." 346 U.S. at 438. The present case, however, differs from *Wilko* in two important respects.

First of all, Coenen agreed to arbitrate *after* the dispute had arisen. This question was left open by the Court in *Wilko*, 346 U. S. at 438 (concurring opinion of Jackson, *J.*). In subsequent decisions, however, courts have held that agreements to arbitrate made after a dispute has arisen are valid. *Gardner v. Shearson, Hammill & Co.*, 433 F. 2d 367 (5th Cir. 1970); *Moran v. Paine, Webber, Jackson & Curtis*, 389 F. 2d 242 (3d Cir. 1968).

Secondly, *Wilko* involved a dispute between an investor and a member of a national securities exchange, not a dispute "between members." It has been held that:

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> The 1933 Act was designed to protect investors by requiring "issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale." *Wilko v. Swan*, * * * 346 U. S. at 431 * * *. Its determined purpose was not to furnish protection to dealers from the improprieties of fellow dealers, although such might be an incidental benefit of the Act's passage. It was assumed that dealers could fend for themselves; it was the investing public that was in need of protection.

Brown v. Gilligan, Will & Co., supra, 287 F. Supp. 766, 771-72 (S.D.N.Y. 1968). This interpretation of *Wilko* was recently endorsed by this Court in *Axelrod & Co. v. Kordich, Victor & Neufeld, supra*, 1971 Slip Op., 99, 106-107 (2d Cir. 10/18/71), where Judge Timbers, writing for a unanimous panel, observed:

> [T]he policy considerations relied on by the Supreme Court in *Wilko* are inapposite here. The Supreme Court found that the non-waiver provision there involved was designed to protect investors. 346 U.S. at 431. Without such provision, financial houses might escape statutory liability by taking advantage of the inferior bargaining position of customers. But the legislative policy of protecting investors will not be thwarted by compelling an exchange member to arbitrate * * *.

The 1934 Act, moreover, contains a provision that the 1933 Act does not (and it was only the 1933 Act which was at issue in *Wilko*). Section 28(b) of the 1934 Act, 15 U.S.C. Section 78bb(b) (1970), provides:

> Nothing in this chapter shall be construed to modify existing law (1) with regard to the binding

> effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members • • •.

The Court in *Axelrod, supra*, 1971 Slip Op., 99, reconciled Sections 29(a) and 28(b) of the 1934 Act by saying that Section 28(b) creates an exception to Section 29(a) and permits the arbitration of a dispute, involving the 1934 Act, pursuant to the New York Stock Exchange arbitration clause. See also *Brown, supra*, 287 F. Supp. 766, 774. Judge Timbers went on to say, in *Axelrod*, that this interpretation of the 1934 Act is entirely consistent with the Congressional purpose of giving securities exchanges the power of self-regulation.

> The 1934 Act established a statutory scheme of "supervised self-regulation" for stock exchanges. "This involves control of exchange markets by requiring or permitting national securities exchanges to adopt rules governing their practices and procedures and the business conduct of the members, and in each case imposes the responsibility for enforcement of these rules on the exchanges themselves." SEC, Report of Special Study of Securities Markets, H. R. Doc. No. 95, 88th Cong., 1st Sess., pt. 1, at 3 (1963). See *Colonial Realty Corporation v. Bache & Co.*, 358 F. 2d 178, 181 (2d Cir.); *cert. denied*, 385 U. S. 817 (1966); *Silver v. New York Stock Exchange*, 373 U. S. 341, 352 (1963).

Axelrod, supra, 1971 Slip Op. 99, 102 (2d Cir. 10/18/71). See also *Brown, supra*, 287 F. Supp. 766, 773 (S.D.N.Y. 1968).

Pursuant to this self-regulatory scheme, the exchanges have promulgated rules to govern the conduct of members. The 1934 Act requires that such rules be "just and adequate to insure fair dealing and to protect investors

• • •." Section 6(d), 15 U.S.C. Section 78f(d) (1970). Furthermore, Section 6(c), 15 U.S.C. Section 78f(c) (1970) provides:

> Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder • • •

See also *Axelrod, supra*, 1971 Slip Op. 99, 102 (2d Cir. 10/18/71); *Brown, supra*, 287 F. Supp. 766, 773-774 (S.D.N.Y. 1968).

We fully agree with the reasoning in *Brown and Axelrod* that the arbitration clause contained in the New York Stock Exchange Constitution is precisely the kind of self-regulatory provision called for by the 1934 Act. Instead of violating the policy behind the Act, as appellant contends, arbitration in this case furthers that policy.

III

The Antitrust Claims

Coenen's final contention is that his Third Count is not arbitrable because it alleges violation of Sections 1 and 2 of the Sherman Act and Sections 4 and 12 of the Clayton Act.

At this point we must examine the allegations of the complaint more closely. Pressprich as an investment banker and stockbroker is alleged to make "a market in the over-the-counter trading of the common stock of Stirling Homex Corporation." At a time when he was a director of Stirling and in August 1968 Coenen bought 90,000 shares of Stirling and the certificates of stock issued to him bore the legend that they were "acquired for investment" and would not be transferred unless registered under the 1933 Act or Stirling was furnished with an

opinion of counsel satisfactory to Stirling to the effect that no registration was required. In February, 1970 underwriters represented by Pressprich sold 1,175,000 shares to the public "pursuant to a registration statement" under the 1933 Act. In the Spring of 1970, it is alleged, Coenen and his firm were being pressed by banks for additional collateral on its loans and they decided "to sell a substantial portion of [Coenen's] 90,000 shares in Stirling." Pressprich and Stirling, however, were alleged to have agreed to "maintain or increase" the price of Stirling stock on the market by "limiting or reducing" the supply of Stirling stock on the open market and hence decided to keep Coenen's 90,000 shares off the market by representing to Coenen that his 90,000 shares could not legally be sold without having been registered. The allegations concern attempts to obtain letters from various counsel and Stirling's position that "such opinions were unsatisfactory." Without an order from Stirling the First National City Bank in New York, the transfer agent, would not transfer the stock containing the legend. This led to what appears to be the central feature of the dispute, an alleged sale of the 90,000 shares by Coenen through Pressprich to an institutional buyer at $10 a share. A "purported" confirmation of this sale was sent by Pressprich to Coenen on August 28, 1970 but Coenen "disavowed the purported sale" before the delivery date of September 2, 1970. The complaint alleges various misrepresentations by Pressprich which resulted in the "coercion" which caused Coenen to give in and on September 25, 1970 to direct "that his shares be delivered to Pressprich at a price of $10 per share." All this is alleged in Count One, a diversity claim, repeated in the Fourth Count as a breach of duty under the common law and Section 8-401 of the Uniform Commercial Code. The same allegations are repeated in Count Two as constituting a scheme to defraud Coenen within the meaning

of Rule 10b-5 promulgated in implementation of Section 10(b) of the 1934 Act. And the same allegations are repeated in Count Three, coupled with the purely conclusory statement that this is a claim based upon Sections 4 and 12 of the Clayton Act, 15 U.S.C. Sections 15 and 22, and that the acts alleged constitute a combination and conspiracy in restraint of trade in the common stock of Stirling, in violation of Section 1 of the Sherman Act, 15 U.S.C., Section 1 and an unlawful conspiracy to monopolize the market in the trading of the stock of Stirling, in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2. In this Count Three Coenen demands triple damages in the total amount of $4,725,000 and attorneys' fees.

There have been many statements in court opinions to the general effect that antitrust claims are not proper subjects for arbitration. See *e. g., American Safety Equipment Corp. v. J.P. Macguire & Co.*, 391 F. 2d 821 (2d Cir. 1968); *Matter of Aimcee Wholesale Corp.*, 21 N. Y. 2d 621, 289 N. Y. S. 2d 968 (1968); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F. 2d 980 (9th Cir. 1970); *A&E. Plastik Pak Co. v. Monsanto Co.*, 396 F. 2d 710 (9th Cir. 1968).

The court below, however, ruled that arbitration is proper in this case because the agreement to arbitrate was made after the dispute arose. This is consistent with the language in several cases recognizing this exception to the general rule. See *e. g., American Safety Equipment Corp. v. J.P. Maguire & Co., supra*, 391 F. 2d 821, 827 (2d Cir. 1968); *Power Replacements, Inc. v. Air Preheater Co., supra*, 426 F. 2d 980, 984 (9th Cir. 1970); Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U.L. Rev. 1072, 1079-80, n. 31 (1969). We base our affirmance squarely on this ground. The courts give as reasons for this that the parties already know just what they are agreeing to arbitrate, and also that, as a claim-

ant is not required to sue and is always free to settle a private triple-damage antitrust case, his agreement to arbitrate is in effect an agreement to settle the dispute. So here the agreement to arbitrate may be regarded as an agreement to arbitrate a specific existing dispute.

We think it proper to add, however, that, except for what appear to be no more than perfunctory and formal allegations of an antitrust claim, this complaint asserts what looks like the common, garden variety of alleged scheme to defraud in a security transaction. This is precisely the sort of breeder of ill-feeling between members of the Exchange it was intended to keep out of the courts. It will be a pity if it should ever be held that any member of the Stock Exchange can frustrate the arbitration clause of the Stock Exchange Constitution, the most significant of the measures taken to implement the self-regulation contemplated by the 1934 Act, by merely tossing into a complaint involving a dispute that arose after both parties to the dispute had become members of the Exchange, a few conclusory phrases to give the illusion of a triple-damage antitrust claim.

Accordingly, the arbitration may proceed. And, after it is concluded, hopefully in a few days, these stockbrokers can get back to work.

Affirmed.

APPENDIX E

Judgment of the United States Court of Appeals for the Second Circuit Affirming the Order of the District Court

UNITED STATES COURT OF APPEALS,

For the

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of January one thousand nine hundred and seventy-two.

Present:

Hon. Harold R. Medina
Hon. Walter R. Mansfield
Hon. William Hughes Mulligan
Circuit Judges.

Docketed As a Judgment on February 16, 1972

DALE S. COENEN,

Plaintiff-Appellant,

v.

R. W. PRESSPRICH & CO.,

Defendant-Appellee,

STIRLING HOMEX CORPORATION,

Defendant.

71 Civ. 724

Appendix E

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

APPENDIX F

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

DALE S. COENEN,

Plaintiff-Appellant,

v.

R. W. PRESSPRICH & CO.,

Defendant-Appellee,

STIRLING HOMEX CORPORATION,

Defendant.

71-1714

A petition for rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the plaintiff-appellant, a poll of all the active circuit judges having been taken, and a majority not having been obtained, it is ordered that said petition be and it hereby is denied. Judges Hays, Feinberg and Oakes dissent.

WILFRED FEINBERG
Acting Chief Judge

February 7, 1972.

APPENDIX G

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

DALE S. COENEN,

Plaintiff-Appellant,

v.

R. W. PRESSPRICH & Co.,

Defendant-Appellee,

STIRLING HOMEX CORPORATION,

Defendant.

71-1714

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

February 7, 1972.

HAROLD R. MEDINA
U. S. C. J.

WALTER R. MANSFIELD
U. S. C. J.

WILLIAM H. MULLIGAN
U. S. C. J.

February 7, 1972.

APPENDIX H

Complaint

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

DALE S. COENEN,

Plaintiff,

against

R. W. PRESSPRICH & Co., Inc., and STIRLING HOMEX CORPORATION,

Defendants.

AS AND FOR A FIRST CLAIM FOR RELIEF AGAINST BOTH DEFENDANTS

1. Plaintiff Dale S. Coenen is a citizen and resident of the State of Connecticut.

2. Upon information and belief defendant R. W. Pressprich & Co., Inc. (hereinafter called "Pressprich") is a New York corporation with its principal place of business at 80 Pine Street, New York, New York; and, accordingly, it is an inhabitant of this district. It is in the investment banking business and stock brokerage business and, among other activities, as a stockbroker makes a market in the over-the-conter trading of the common stock of Stirling Homex Corporation.

3. Stirling Homex Corporation (hereinafter called "Stirling") is a corporation organized and existing under the laws of the State of Delaware with its principal place

of business in Avon, New York, and is found and transacts business within this district.

4. Jurisdiction for this claim is based upon diversity of citizenship; the action is between citizens of different states and the amount in controversy exceeds $10,000 exclusive of interest and costs.

5. Coenen served as a director of Stirling from July 1968 to July 1969, when he resigned from the Board of Directors of Stirling. At that time he ceased to take part in the management of the affairs of the company.

6. In August 1968 Coenen purchased 90,000 shares from Stirling when Stirling was a privately held corporation. Said shares were issued to him for cash that he paid to Stirling. The certificates representing the shares had the following legend imprinted thereon:

> "The shares represented by this certificate have been acquired for investment and may not be sold or transferred unless they are registered under the Securities Act of 1933 or the company has been furnished with an opinion of counsel satisfactory to it, to the effect that no such registration is required in connection with such sale or transfer."

7. In February 1970 underwriters represented by Pressprich sold 1,175,000 shares of common stock of Stirling to the public pursuant to a registration statement under the Securities Act of 1933. Since then, the stock has been widely traded on the over-the-counter market and is generally quoted daily by more than twenty dealers, including Pressprich.

8. On September 25, 1970, due to the illegal acts of defendants set forth below, Coenen sold his 90,000 shares under duress to Pressprich at a price of $10 per share, as opposed to the then market price of $27-1/2 a share.

Appendix H

9. In the Spring of 1970 Coenen & Co., Inc., a broker-dealer and investment banking firm, of which Coenen was and still is a principal stockholder, became in need of additional capital. Banks from which Coenen had borrowed money in sizeable amounts were pressing for repayment and additional collateralization of the loans. These requests were made due to the tightening of the money market and decline in value of the securities pledged by Coenen with the banks as collateral. To meet these and other demands for funds, Coenen determined to sell a substantial portion of his 90,000 shares in Stirling.

10. In May 1970 Coenen consulted with the New York law firm of Shea, Gallop, Climenko & Gould, general counsel to Stirling, for the purpose of exploring the possibility of selling the aforesaid shares, and was told that counsel knowledgeable in the federal securities area could furnish an opinion that Coenen could sell his shares of Stirling without registering them under the Securities Act of 1933, and was advised to contact counsel of his own choosing.

11. Prior to contacting such counsel, Pressprich was asked to determine whether it would undertake to sell the shares and Pressprich stated that it would do so over a period of time provided an opinion of counsel "satisfactory to the company" [Stirling] was given that no registration was required under the Securities Act of 1933 as required by the legend on Coenen's stock.

12. Thereafter, Coenen called upon the New York law firm of Royall, Koegel & Wells to discuss the possibility of obtaining the required opinion of counsel. In early June 1970, with knowledge of counsel for Stirling, Royall, Koegel & Wells indicated its willingness to render an opinion that the shares could be sold without registration and said information was communicated to Pressprich.

Appendix II

13. Commencing in or about early June 1970, Stirling and Pressprich entered into a conspiracy and scheme, the full and precise terms of which are unknown to the plaintiff at this time, but among which was an agreement whereby Pressprich and Stirling agreed to use their best and joint and concerted efforts to maintain or increase the price of the common stock of Stirling on the open market by artificial means and devices, including, among others, limiting or reducing the supply or float of the common stock of Stirling on the open market.

14. One of the terms of this conspiracy was an agreement between Pressprich and Stirling to use their best efforts to prevent Coenen from selling his 90,000 shares on the open market, in order to limit the supply or float of common stock of Stirling on the open market.

15. In furtherance of this illegal scheme and conspiracy, Pressprich in mid-June 1970 falsely represented to Coenen that his shares could not legally be sold without having been registered under the Securities Act of 1933, and that accordingly it would not act as broker in selling Coenen's 90,000 shares.

16. Pressprich made this representation with knowledge of the willingness of Royall, Koegel & Wells to render an opinion that the shares could be sold without registration. In addition, Pressprich knew that Stirling had been advised to the same effect by Stirling's own independent counsel. Moreover, Pressprich had been advised that Coenen was in desperate need of paying down bank loans and would probably be forced to sell his 90,000 shares in Stirling at distress sale prices if he could be prevented from selling the aforesaid shares on the open market.

17. After Pressprich refused to act as broker to sell Coenen's stock, Coenen asked Saunders, Stiver & Co., investment bankers in Cleveland, Ohio, whether that firm

would so act. Saunders, Stiver undertook to do so provided it was furnished with an opinion of counsel that the shares could be sold without registration and provided that Stirling notified the transfer agent to transfer the shares without registration. Stirling was informed of Saunders, Stiver's position.

18. On June 26, 1970, the Cleveland law firm of Calfee, Halter, Calfee, Griswold & Sommer gave a written opinion to Saunders, Stiver that "Dale S. Coenen may sell up to 45,000 shares of common stock of Stirling Homex Corporation" without registration. The opinion was promptly furnished to Stirling.

19. On July 13, 1970, Royall, Koegel & Wells also gave a written opinion to Coenen that he could resell his shares of Stirling "at this time without registration thereof under the Securities Act of 1933." This opinion too was promptly furnished to Stirling.

20. Said opinions complied with the requirement contained in the legend on Coenen's shares regarding the furnishing to it "with an opinion of counsel satisfactory to it" that no registration was required.

21. In spite of the delivery of such opinions and repeated requests by Coenen, Stirling nevertheless refused to remove or order the transfer agent to remove the legend from Coenen's certificate and stated that such opinions were unsatisfactory. This refusal was made to effectuate the illegal scheme and conspiracy between Stirling and Pressprich to artificially limit or reduce the free supply or float of Stirling stock in the open market.

22. In early August 1970, after further demands for transfer by Coenen, Shea, Gallop, Climenko & Gould, general counsel for Stirling, advised Coenen to present his Stirling stock to the First National City Bank, New

York, New York, the transfer agent, in order to obtain unlegended stock.

23. Upon presentation, the First National City Bank advised Coenen that it would not remove the legend and free the shares because Stirling would not issue an order to the transfer agent directing it to remove the legend prohibiting transfer.

24. During this period Stirling adhered to its position that the opinions rendered by Royall, Koegel & Wells and Calfee, Halter, Calfee, Griswold & Sommer were not "satisfactory." Stirling stated that it was seeking the opinion of still another outside counsel and further represented that a "no action" letter from the SEC would probably be necessary for the stock to be freely transferable on the open market.

25. Stirling confirmed in its refusal to remove the legend and on August 18, 1970, falsely represented to Coenen that it still had not been able to obtain a "satisfactory" opinion. Stirling therefore suggested a "compromise" in which Pressprich would sell Coenen's stock with the restrictive legend still on it to an institutional investor at the price of $10 per share. On that date the common stock of Stirling was trading at about $16 per share. Stirling said to Coenen that this transaction depended upon Coenen's assent to it within a matter of minutes.

26. In reliance upon the representation that his shares could not be freely traded, Coenen, who was at that time coming under still further financial pressure, agreed to this proposed sale on the condition precedent that it be consummated immediately; defendants did not comply with this condition precedent and, accordingly, the proposed contract of sale was never made.

27. Thereafter Pressprich and Stirling embarked upon a series of further misrepresentations and other illegal

acts designed to force Coenen to sell his Stirling shares to institutional investors through Pressprich at $10 per share, but this time with the legend against transferability removed.

28. Following August 18, Pressprich represented to Coenen that potential institutional buyers of his Stirling stock demanded that the stock be sold to them without the restrictive legend against transferability and, in direct contradiction of the position it had taken in June 1970 that it would be illegal for it to sell said shares, Pressprich now represented that it could sell the stock because the buyers were "sophisticated."

29. Pressprich also contacted other holders of Stirling stock bearing the same restrictive legend as Coenen's and tried to solicit sales of their stock, with the legend removed, at the price of $10 per share. Pressprich stated to these stockholders that all that was required for the sale was their obtaining an opinion of counsel that their shares could be sold without registration and that if this were done Pressprich would take care of having the restrictive legend removed.

30. On August 25, 1970, after Coenen discovered that Pressprich was soliciting purchases from other holders of stock bearing the same restrictive legend, Coenen confronted Stirling with this fact and once more demanded that Stirling direct the transfer agent to remove the restrictive legend on his stock.

31. Stirling thereupon tried to justify its continuing refusal to transfer Coenen's shares by falsely representing that Coenen's stock differed from that of other holders of stock containing the same restriction because his stock was "clouded." No explanation was given then or thereafter as to the meaning of the term "clouded" stock and said false representation was made to induce

Coenen to sell that stock to institutional investors at a price far below the market.

32. On August 26, 1970, in effectuation of the scheme and conspiracy, and with knowledge that the August 18 proposed "compromise" sale of Coenen's stock to an institutional investor had not in fact been made, Pressprich sent to Coenen a purported confirmation of a sale of Coenen's 90,000 shares to Pressprich at the price of $10 per share.

33. Prior to September 2, the delivery date specified in the purported confirmation, Coenen disavowed the purported trade.

34. Thereafter, up to and including September 21, 1970, Pressprich and Stirling continued falsely to represent that Coenen's stock was "clouded" stock which could only be sold to institutional investors, and did so for the purpose of forcing Coenen to sell his shares at an artificially depressed price and prevent him from placing said shares on the market. They falsely represented that an opinion rendered to Stirling and Pressprich by Manuel Cohen, Esq., former Chairman of the Securities and Exchange Commission, was so qualified, whereas, upon information and belief, said opinion had no such qualification.

35. During the month of September 1970, up to and including September 21, 1970, Coenen and his attorneys repeatedly disavowed the purported sale to Pressprich on the grounds, among others, that the representations made by Stirling and Pressprich regarding the inability to remove the restrictive legend on Coenen's shares were fraudulent.

36. On the morning of September 21, 1970, Pressprich was advised in writing by Coenen's attorneys that the sale which it purported to have effected as of August 26 was void.

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37. On information and belief, Pressprich immediately informed Stirling of the communication from Coenen's attorneys, and thereafter Stirling issued oral instructions over the telephone to the First National City Bank to remove the restrictive legend, and it, as transfer agent, did so.

38. Stirling had no new grounds for issuing these instructions to remove the restrictive legend and Stirling issued said oral instructions to the transfer agent for the purpose of enhancing Pressprich's position that the purported sale to it on August 26 was not void.

39. During the period September 21 to September 25, 1970, Coenen tried to sell his Stirling stock, from which the restrictive legend had now been removed, but Pressprich falsely represented to all persons involved with such contemplated sales that the stock had already been sold to it and that Pressprich, as well as institutional investors to whom Pressprich had purportedly resold Coenen's stock, would sue them if they, in any way, participated in or facilitated such a sale.

40. During this period Pressprich represented to Coenen that it, as well as institutional investors to whom it had purportedly resold Coenen's shares, would take legal action against Coenen if he did not complete the sale claimed by Pressprich to have been made on August 26.

41. During September 1970, to put increased pressure on Coenen to agree to the purported sale, Pressprich threatened to make a formal complaint to the National Association of Securities Dealers that Coenen's company, Coenen & Co., a member of the association, had refused to complete a trade in violation of the rules of that association; such a complaint would have placed the license of Coenen & Co. as a securities dealer in jeopardy.

42. On September 25, 1970, Coenen was still under the increasing pressure from banks to pay down loans and

was unable to sell any part of the 90,000 shares due to the misrepresentations and threats of Pressprich and Stirling. Accordingly, on that date Coenen directed that his shares be delivered to Pressprich at a price of $10 per share.

43. Said delivery was effected under duress and as a direct consequence of the acts taken by Pressprich and Stirling in effectuation of the conspiracy.

44. The aforesaid scheme and conspiracy constituted a breach of Stirling's duty imposed upon it as issuer by both common law and §8-401 of the Uniform Commercial Code to effect a prompt transfer of the securities that it issued.

45. As a consequence of the defendants' wrongful acts Coenen was prevented from selling his shares of Stirling stock at the market price and has suffered damages equivalent to the difference between the price which he was forced to sell under duress, $10 per share, and the market price on September 25, $27-1/2 per share, or $1,575,000.

AS AND FOR A SECOND CLAIM FOR RELIEF AGAINST BOTH DEFENDANTS

46. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 3, 5 through 43 and 45 with the same force and effect as if set forth herein at length.

47. Jurisdiction and venue for this claim for relief are based upon 15 U.S.C. §78aa, commonly known as §27 of the Securities Exchange Act of 1934, as amended.

48. The acts set forth above constituted a scheme to defraud Coenen within the meaning of Rule 10b-5 promulgated by the Securities and Exchange Commission in

the implementation of 15 U.S.C. §78j(b), commonly known as §10(b) of the Securities Exchange Act of 1934.

49. The statements made by Stirling and Pressprich set forth in Paragraphs 15, 23, 24, 28, 31, 34 and 39 were false and known by them to be false when they were made, and constituted material misrepresentations of the facts relating to the transferability of the 90,000 shares of Stirling common stock owned by Coenen.

50. The aforesaid misrepresentations made by Stirling and Pressprich were made for the purpose of defrauding Coenen in connection with the sale of any or all of his 90,000 shares of Stirling common stock in violation of the aforesaid Rule 10b-5 and 15 U.S.C. §78j(b).

51. In carrying out the aforesaid scheme to defraud Coenen and in making the misrepresentations of material facts, both Stirling and Pressprich employed instrumentalities of interstate commerce.

AS AND FOR A THIRD CLAIM FOR RELIEF AGAINST BOTH DEFENDANTS

52. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 3, 5 through 43 and 45 with the same force and effect as if set forth herein at length.

53. Jurisdiction and venue for this claim for relief are based upon 15 U.S.C. §§15 and 22, commonly known as §§4 and 12 of the Clayton Act.

54. The aforesaid agreements and actions by the defendants constitute an unlawful combination and conspiracy in restraint of trade in the common stock of Stirling, in violation of 15 U.S.C. §1, commonly known as §1 of the Sherman Act.

55. The aforesaid agreements and actions by the defendants constitute an unlawful conspiracy to monopolize, attempt to monopolize and monopolization of the market for the trading of common stock of Stirling in violation of 15 U.S.C. §2, commonly known as §2 of the Sherman Act.

AS AND FOR A FOURTH CLAIM FOR RELIEF AGAINST DEFENDANT STIRLING

56. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 43 and 45 with the same force and effect as if set forth herein at length.

57. The aforesaid conduct by Stirling constituted a breach of its duty imposed upon it as issuer by both common law and §8-401 of the Uniform Commercial Code to effect a prompt transfer of the securities that it issued.

WHEREFORE, Coenen requests judgment as follows:

a) On the first claim for relief, judgment against defendants jointly and severally in the amount of $1,575,000 with interest from September 25, 1970;

b) On the second claim for relief, judgment against defendants jointly and severally in the amount of $1,575,000 with interest from September 25, 1970;

c) On the third claim for relief, judgment against defendants jointly and severally for treble damages in the amount of $4,725,000 plus reasonable attorneys' fees incurred in the prosecution of the action;

d) On the fourth claim for relief, judgment against defendant Stirling Homex Corporation in the amount of $1,575,000 with interest from September 25, 1970;

e) Judgment against the defendants jointly and severally from costs and disbursements of this action and

such other and further relief as the court may deem just and proper.

Dated: New York, New York
February 18, 1971

ROYALL, KOEGEL & WELLS
By DAVID F. DOBBINS
A Member of the Firm
Attorneys for Plaintiff
Dale S. Coenen
200 Park Avenue
New York, New York 10017

Affidavit of Service

State of New York
County of New York } ss:

THOMAS W. TOWELL, Jr., being duly sworn, deposes and says:

That he served the foregoing Petition and Appendix upon the attorneys for respondents herein, on March 31, 1972, by mailing three true and correct copies thereof, postage prepaid, to Winthrop, Stimson, Putnam & Roberts at 40 Wall Street, New York, New York 10005, attorneys for R. W. Pressprich & Co., Inc., and to Sullivan & Cromwell at 48 Wall Street, New York, New York, attorneys for Stirling Homex Corp.

/s/ THOMAS W. TOWELL, Jr.
THOMAS W. TOWELL, Jr.

Sworn to before me this
31 day of March, 1972.

Notary Public.

SIGMUND KATZ
Attorney & Counselor at Law
No. 30-7177500
Qualified in Nassau County
Certified with New York County Clerk
Commission Expires March 30, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1267

DALE S. COENEN,

Petitioner,

—against—

R. W. PRESSPRICH & CO., INC., and
STIRLING HOMEX CORPORATION,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Moran v. *Paine, Webber, Jackson & Curtis*, 422 Pa. 66, 220 A.2d 624 (1966) 10

Moran v. *Paine, Webber, Jackson & Curtis*, 389 F.2d 242 (3d Cir. 1968) 10

Pearlstein v. *Scudder & German*, 429 F.2d 1136 (2d Cir. 1970), *cert. denied*, 401 U.S. 1013 (1971) 10

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1267

DALE S. COENEN,

Petitioner,

—against—

R. W. PRESSPRICH & CO., INC., and
STIRLING HOMEX CORPORATION,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent R. W. Pressprich & Co. Incorporated ("Pressprich") submits this brief in opposition to the petition for a writ of certiorari filed herein by Dale S. Coenen ("Coenen").

Citation to Opinions Below

The opinion and order of the District Court (Pet. App. B), erroneously stated in the petition to be unreported, is reported at 329 F.Supp. 1296.

The opinion of the Court of Appeals (Pet. App. D), erroneously stated in the petition to be unreported, is reported at 453 F.2d 1209.

Question Presented

Whether a member of the New York Stock Exchange can avoid arbitration of a claim against another member arising from a securities transaction and asserted alternatively under the common law and the federal securities and antitrust laws, when

(a) the member, with full knowledge of his claim but prior to its actual assertion, joined the Exchange and pledged to obey its Constitution requiring arbitration of "any controversy" between persons who are members; and

(b) the self-regulatory mandate given to the Exchange by Congress expressly includes the settlement of disputes between members.

Statement of the Case

The Complaint Herein

In his complaint Coenen alleges that in 1968, while a director of defendent Stirling Homex Corporation ("Stirling"), he purchased 90,000 shares of its stock for investment purposes. The stock certificate issued to him contained the standard legend preventing the sale or transfer of the shares unless registered under the Securities Act of 1933, or unless Coenen produced a letter of counsel "satisfactory" to Stirling that such registration was not required. Coenen claims that "in the Spring of 1970 Coenen & Co., Inc., a broker-dealer and investment banking firm of which Coenen was and still is a principal stockholder, became in need of additional capital." Accordingly, he "determined to sell a substantial portion of his 90,000 shares in Stirling."

The essence of Coenen's claim is that he was victimized by Pressprich and Stirling, who conspired to prevent him from selling his shares on the open market, and forced him "under duress" to sell to Pressprich at a greatly reduced price in September of 1970. Coenen contends that Pressprich made false representations to him as to the transferability of his shares, that Pressprich and Stirling would not accept legal opinions that the shares need not be registered, and that Stirling wrongfully prevented and delayed the removal of the restrictive legend by its transfer agent.

Coenen has taken this relatively simple claim of fraud and has converted it into four separate "Claims For Relief", only three of which are directed against Pressprich. These three claims allege (1) common law conspiracy with Stirling to injure plaintiff by the acts described above (jurisdiction being based on diversity of citizenship); (2) violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5; and (3) conspiracy with Stirling to restrain and monopolize trade "in the common stock of Stirling," in violation of sections 1 and 2 of the Sherman Act. The securities and antitrust claims simply reallege by reference the factual allegations contained in the common law claim, and then add conclusory allegations as to violation of the statutes in question.

The Facts Relevant to the Arbitration Issue

Pressprich has been a member corporation of the New York Stock Exchange ("Exchange") since its incorporation in March 1968 (and its predecessor partnership was a member firm of the Exchange). Coenen has been an allied member of the Exchange since December 31, 1970, and

Coenen & Co., Inc., of which Coenen is a principal stockholder and Chairman of the Board, has been a member corporation of the Exchange since such date. In his application to become an allied member, signed and sworn to on November 19, 1970, Coenen, in accordance with Article IX, section 9 of the Exchange's Constitution, pledged that he would "abide by the Constitution [of the Exchange] as the same has been or shall be from time to time amended, and by all rules adopted pursuant to the Constitution . . . ." Article VIII, section 1 of that Constitution provides as follows:

> "Any controversy between parties who are members, allied members, member firms or member corporations shall, at the instance of any such party, and any controversy between a non-member and a member or allied member or member firm or member corporation arising out of the business of such member, allied member, member firm or member corporation, or the dissolution of a member firm or member corporation, shall, at the instance of such non-member, be submitted for arbitration, in accordance with the provisions of the Constitution and the rules of the Board of Governors."

On January 6, 1971, after Coenen had become an allied member of the Exchange, his counsel sent Pressprich a copy of a complaint (substantially identical to that later filed herein) "which we have been instructed to file on behalf of Mr. Coenen against your firm and Stirling Homex," and suggested the possibility of "an amicable settlement." Receipt of this letter constituted the first notice to Pressprich that Coenen intended to assert a claim against it on the basis of the stock sale in question. Pressprich wrote Coenen demanding that the controversy be-

tween them be submitted to arbitration, in accordance with the Constitution and rules of the Exchange. Coenen's response was to commence this action against Pressprich and Stirling, thereby reneging on his pledge to abide by the Constitution and rules of the Exchange calling for arbitration of any controversy between a party who is an allied member of the Exchange and a member corporation.

The Proceedings Below

After service of the complaint Pressprich made a motion, pursuant to 9 U.S.C. § 3 and Article 75 of the CPLR, for an order staying the action as against it until arbitration had been had of the controversy between Coenen and Pressprich in accordance with the Constitution of the Exchange and the rules of the Board of Governors. Despite Coenen's vigorous opposition, Judge Charles M. Metzner of the United States District Court for the Southern District of New York granted the motion in an opinion and order dated April 22, 1971.

Judge Metzner rejected every contention made by Coenen as an excuse for evading his commitment as an allied member of the Exchange to arbitrate "any controversy" with a member corporation. He noted that Coenen's claims were asserted against Pressprich *after* Coenen had joined the Exchange, and that Coenen, a sophisticated person in the securities business, was aware of such claims and of his responsibilities as an Exchange member when he applied for membership. Judge Metzner also ruled that Coenen's claim under the Securities Exchange Act of 1934 was arbitrable, since the contract to arbitrate had been knowingly entered into after the securi-

ties dispute had arisen. Finally, Judge Metzner held Coenen's antitrust claim arbitrable for the same reason. As Coenen knew of his possible claim against Pressprich before he joined the Exchange, his rights were fixed at that time, and under those circumstances an agreement to submit to arbitration, made with full knowledge of the claim, was comparable to settlement. Judge Metzner adhered to his decision on Coenen's motion for reargument.

The Court of Appeals for the Second Circuit unanimously affirmed, agreeing with Judge Metzner on every point. As additional grounds for its conclusion that Coenen could not evade his commitment to arbitrate, the court held that settlement through the Exchange's arbitration machinery of securities law and antitrust claims such as those made by Coenen was consistent with, and in furtherance of, the self-regulatory powers and functions expressly granted by Congress to national securities exchanges. A petition for rehearing *en banc* was denied by the court by a vote of 6 to 3.*

In his present petition, Coenen does not seek review of the conclusion of the lower courts that the broad language of the Exchange's arbitration provision by its terms covers this controversy between a member corporation and an allied member of the Exchange. Rather, he contends that judicial exceptions should be engrafted onto that provision, and that his resort to the federal securities and antitrust

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* Coenen has described the decision of the Court of Appeals as a holding "that the broad arbitration clause of the Exchange constitution in effect afforded Pressprich immunity from concededly valid claims for damages" under the federal antitrust and securities laws. (Pet. p. 4) Similarly, he contends that the ruling permits Pressprich "to conspire with impunity . . . ." (Pet. p. 12) These characterizations are gross distortions of a holding that all of Coenen's claims shall be presented to and determined by arbitrators.

laws as alternate grounds for recovery should succeed in enabling him to by-pass the Exchange and to seek recourse in a judicial forum. He further asserts the irrelevance of his awareness of these claims at the very time that he agreed to be bound by the arbitration provision in question.

Argument

Notwithstanding petitioner's exaggerated contentions about the significance and scope of the ruling below, the issue here posed is an exceedingly narrow one, namely, whether an obligation between stock exchange members to arbitrate "any controversy" will be enforced when the plaintiff's claim arose before, but was asserted after, his admission to exchange membership, and is expressed alternatively in common law, securities law and antitrust terms. The intervention of exchange membership between the dates of accrual and prosecution of a claim is an unusual sequence of events, and one likely to recur most infrequently, if at all. Thus, any ruling by this Court as to the significance of Coenen's failure to sue until after his date of admission will be of extremely limited precedential value.

It is undisputed that Coenen joined the New York Stock Exchange fully cognizant of all his claims against Pressprich, which were based on events occurring during the period from May to September 1970, but which Coenen, for reasons of his own, did not choose to assert until after he became a member on December 31, 1970. In contrast to the situation prevailing when a controversy arises from events occurring after admission to membership, Coenen enjoyed the unique advantage of knowing exactly what

claims he had against an Exchange member at the very time that, through his voluntary action, he nevertheless consented to be bound by the arbitration provision. All that the lower courts here required was that Coenen, having thus chosen to accept the benefits of membership in the Exchange, live up to the agreements flowing from such membership.

In other cases the lower courts have uniformly held that an arbitration agreement knowingly entered into after a claim has arisen should be enforced in accordance with its terms, regardless of whether the claim to be arbitrated contains securities law or antitrust elements. Such a result not only is in accord with the well-recognized federal policy favoring arbitration, but in the present case also implements the mandate of self-regulation, embracing the settlement of disputes among members, expressly given to the Exchange by Congress and the Securities and Exchange Commission. Coenen's position would imperil this self-regulatory scheme by permitting easy evasion of the Exchange's arbitration machinery, thereby compelling judicial involvement in member controversies which should be handled internally.

Thus no important question of federal law for review by this Court is presented by the lower courts' conclusion that Coenen is bound to arbitrate claims of which he had knowledge when the arbitration agreement was consummated. Nor can such a result be attacked as inconsistent with the rulings of other lower courts. Coenen's awareness of his claims at the time of admission to Exchange membership, and his failure despite such awareness to prosecute the claims before joining the Exchange, make clear that this case is a totally inappropriate vehicle for delving

into the general relationship between private actions under the federal antitrust and securities laws, and enforcement of arbitration clauses.

Even assuming—contrary to the fact—that Coenen's claims against Pressprich had arisen after Coenen had joined the Exchange, a ruling compelling arbitration would clearly be correct in view of the status of the disputants as Exchange members, the scope of the Exchange's arbitration clause, and the provisions of the Securities Exchange Act of 1934. The alternative holdings of the Second Circuit to this effect, which were clearly unnecessary to the result reached, afford no valid basis for granting certiorari.

I.

A holding enforcing an arbitration agreement consummated after the accrual of federal claims does not warrant review by this Court.

In *Wilko* v. *Swan*, 346 U.S. 427 (1953), the Court concluded that § 14 of the Securities Act of 1933 (15 U.S.C. § 77n) (virtually identical to § 29(a) of the 1934 Act (15 U.S.C. § 78cc(a)), voiding any provision for waiver of statutory rights, made unenforceable an agreement by a customer to arbitrate a claim against a securities brokerage firm based on a violation of the 1933 Act. The Court observed that the agreement in question was one "to arbitrate a future controversy," made "prior to any violation of the Securities Act," and thus the plaintiff had been "restricted in his choice of forum prior to the existence of a controversy. While the Securities Act does not require a petitioner to sue, a waiver in advance of a controversy stands upon a different footing." (*Id.* at 430, 435, 438). The

Court specifically pointed out that "we need not and do not go so far" as to void an arbitration agreement entered into "after the creation of a liability". (*Id.* at 438). In his concurring opinion, Mr. Justice Jackson noted that the parties could agree upon arbitration after the controversy had arisen. (*Ibid.*)

Since Coenen's agreement to arbitrate was entered into *after* the creation of the liability, both lower courts held that *Wilko* posed no bar to arbitration of Coenen's second claim against Pressprich, which is predicated upon a violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. In so ruling, they followed the unanimous conclusion of other courts that agreements to arbitrate made after the events giving rise to the controversy are not invalidated under the federal securities laws. *Gardner* v. *Shearson, Hammill & Co.*, 433 F.2d 367 (5th Cir. 1970), *cert. denied*, 401 U.S. 978 (1971); *Moran* v. *Paine, Webber, Jackson & Curtis*, 389 F.2d 242 (3d Cir. 1968); *Moran* v. *Paine, Webber, Jackson & Curtis*, 422 Pa. 66, 220 A.2d 624 (1966); *Reader* v. *Hirsch & Co.*, 197 F. Supp. 111, 116-17 (S.D.N.Y. 1961); Note, 62 Yale L.J. 985, 994-96 (1953). In *Pearlstein* v. *Scudder & German*, 429 F.2d 1136, 1143 (2d Cir. 1970), *cert. denied*, 401 U.S. 1013 (1971), the Court of Appeals observed "that the remedial right of access to the courts after an active controversy has arisen can be waived knowingly in favor of arbitration," and that the "desirable end" of arbitration was "easily compatible with the broad purpose of the [1934] Act."

A similar question was presented by Coenen's third claim for relief, where he embellished his complaint by adding an antitrust count to the common law and securities act counts which form the substance of his first and

second claims. Containing no new factual allegations, the third claim simply repeats and realleges the facts set forth in Coenen's initial claim for relief, and then adds two wholly conclusory paragraphs alleging that the acts complained of constitute a combination or conspiracy in restraint of trade, in violation of Section 1 of the Sherman Act, and a conspiracy and attempt to monopolize, and monopolization, in violation of Section 2 of that Act.

Following the distinction made in *Wilko*, the lower courts have consistently held that any limitation on the arbitrability of antitrust claims is inapplicable when the agreement to arbitrate is made after the committal of the alleged antitrust violation. Indeed, in *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), upon which Coenen places his principal reliance in his petition (as he did in the lower courts), the court, while holding that pure antitrust claims should not be submitted to arbitration pursuant to a pre-existing agreement to arbitrate, specifically stated that "we do not deal here with an agreement to arbitrate made after the controversy has already arisen. Cf. Wilko v. Swan, 346 U.S. at 438, 74 S.Ct. 192." (*Id.* at 827). Thus, Coenen was hardly "entitled to rely" upon this decision to buttress a belief that his accrued antitrust claims were not made arbitrable by his joining the Exchange. (See Pet. p. 9.)* The Second Circuit noted the inapplicability of its own prior decision in *American Safety* by pointing out that in Coenen's case "the agreement to arbitrate was made after the dispute arose." It based its "affirmance squarely on this ground." (Pet. App. D, p. 21a)

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* The petition misleadingly asserts that "Coenen only agreed to arbitrate any claim that was arbitrable." (Pet. p. 9) What Coenen did agree to arbitrate was "any controversy" with a fellow Exchange member.

In *Power Replacements, Inc.* v. *Air Preheater Co., Inc.*, 426 F.2d 980 (9th Cir. 1970), it was argued that an agreement to arbitrate an antitrust claim should be enforced, on the ground that "since the parties could resolve the dispute by settlement they could also do so by arbitration." (*Id.* at 984) The court noted that "the parties did more than agree to arbitrate existing disputes" and that the alleged antitrust violations forming the basis of the action occurred *after* the agreement to arbitrate was executed. It then held:

> "The analogy to settlement is applicable only with respect to claims in existence at the time of the agreement. The parties knew what claims were then being submitted to arbitration. This is not true as to any possible claim in violation of the antitrust laws which might arise during the ensuing two year period. Nor does the time limitation justify a different rule. Controlling is the fact that the parties agreed to arbitrate antitrust claims which were not in existence and the nature and effect of which were unknown when the agreement was made." (*Ibid.*)*

As both lower courts correctly held, arbitration here represents no more than a method of settlement fashioned by the parties after the claims were known. Indeed, it is of interest that Coenen's counsel mailed a proposed thirteen-page complaint to Pressprich on January 6, 1971, which was only the third working day after Coenen was

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* *See also* Pitofsky, "Arbitration and Antitrust Enforcement," 44 N.Y.U.L. Rev. 1072, 1079-80 (1969), endorsing an exception to a presumption against arbitrating antitrust claims "where the arbitration agreement is entered into after the claim arises." When the events leading up to the controversy have already occurred, there is no risk that a party will be compelled by unequal bargaining power to agree to arbitrate future rights, without knowing what such rights may be.

admitted as an allied member of the Exchange. This sequence clearly indicates that Coenen and his counsel had under active consideration the claim against Pressprich at the very time that Coenen's application to become an allied member was receiving Exchange approval, thereby binding him to obey its Constitution and rules.

II.

The alternative holdings as to the arbitrability of securities and antitrust claims accruing after admission to Exchange membership do not warrant review by this Court.

While the foregoing considerations are dispositive of Coenen's contentions, the Court of Appeals also concluded that Coenen's securities law and antitrust claims should be arbitrable even if they had arisen after he joined the Exchange.* These rulings were unnecessary to the result reached, and it is clear that this Court will not grant certiorari simply to review independent or alternative holdings. Nevertheless, the holdings were manifestly correct, and in all respects consistent with other rulings of the lower courts.

The Second Circuit's holding that the *Wilko* doctrine does not bar arbitration by a national securities exchange of a dispute between its members involving claimed securities law violations is in accord with the three lower court

* We do not understand petitioner's statement that the Second Circuit "conced[ed] the illegality of submitting to arbitration antitrust claims arising subsequent to Coenen's joining the Exchange." (Pet. pp. 8-9) What the court actually concluded is that "it will be a pity if it should ever be [so] held. . . ." (Pet. App. D, p. 22a)

decisions directly in point. *Axelrod & Co.* v. *Kordich, Victor & Neufeld*, 451 F.2d 838 (2d Cir. 1971); *In re Revenue Properties Litigation Cases*, 451 F.2d 310 (1st Cir. 1971); *Brown* v. *Gilligan, Will & Co.*, 287 F.Supp. 766 (S.D.N.Y. 1968). In these cases and the instant case the courts relied upon § 28(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(b)), providing as follows:

> "(b) Nothing in this chapter shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, . . ."

The courts held that this provision by its terms made inapplicable § 29(a) of the 1934 Act (15 U.S.C. § 78cc(a)), voiding any provision for waiver of statutory rights, and had an obvious impact on § 27 of the Act (15 U.S.C. § 78aa), giving the federal courts exclusive jurisdiction over Exchange Act claims.

Such a holding is unassailable, especially when viewed in the context of the broad grant of self-regulation vested in national securities exchanges by the Securities Exchange Act of 1934. "One aspect of the statutorily imposed duty of self-regulation is the obligation to formulate rules governing the conduct of exchange members." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 353 (1963). Pursuant to this obligation, the Exchange has formulated a rule requiring that members arbitrate controversies between them. The existence and desirability of such a dispute-resolving mechanism have been expressly endorsed by Congress in § 28(b). Moreover, the Exchange has regis-

tered with the Securities and Exchange Commission as a national securities exchange, and has filed with the Commission copies of its Constitution and rules (including the arbitration provisions thereof), which have been found by the Commission to "be just and adequate to ensure fair dealing and to protect investors. . . ." Securities Exchange Act of 1934, §§5, 6(a)(3), 6(d), 15 U.S.C. §§ 78e, 78f(a)(3), 78f(d). Also of relevance is § 6(c) of the Act (15 U.S.C. § 78f(c)), providing:

> "Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder . . . ."

Thus the status of disputants as Exchange members fully justifies, and indeed compels, arbitration before the Exchange of a claim under the federal securities laws, even though an agreement to arbitrate such a claim is not enforceable against a non-member of the Exchange. As the Second Circuit indicated, no different result should be reached because Coenen has tacked on an antitrust claim, almost as an afterthought, to the initial two counts of his complaint. While Coenen now seeks to create the impression that his antitrust claim is the crux of his complaint, his "tossing into [the] complaint . . . a few conclusory phases to give the illusion of a triple damage antitrust claim" (Pet. App. D, p. 22a) is apparent from the face of the document itself. Couching a claim (even one arising after Exchange membership) in antitrust, as well as in securities law, terms should not enable evasion of the arbitration machinery of the Exchange and the statutorily imposed self-regulatory function which it serves. This is especially true since § 29(a) of the 1934 Act, negating cer-

tain arbitration agreements, has no statutory counterpart in the antitrust laws.

If a stock exchange member were permitted to escape his arbitration commitment simply by affixing an antitrust label to his claim against a co-member (even though combined with other theories of recovery), a significant loophole would arise in the scope of the Exchange's arbitration provisions. In many cases it will be no difficult task to weave an antitrust claim into a controversy with another Exchange member. Indeed, a member desiring to avoid arbitration of such a controversy could bring in additional parties, such as employees or other agents of the defendant member, or other members or persons allegedly engaged in joint action with him. The standard "conspiracy" and "restraint of trade" allegations, as applied to conduct by more than one person, and perhaps as part of a multi-count complaint, should enable a skillful pleader to withstand a motion to dismiss, and thereby accomplish his objective of forestalling arbitration. The Second Circuit was understandably reluctant to create this kind of gap in the well-defined scheme of Exchange self-regulation.

It also seems pertinent that while Coenen vigorously resists arbitration, the factual questions presented by the present controversy would seem to be the very matters upon which the expertise of a panel of five arbitrators, consisting of members and allied members of the Exchange, could profitably be brought to bear (see N.Y.S.E. Const., Art. VIII, §§ 4, 5). By no stretch of the imagination can Coenen's claim be held to involve complicated issues of law or of fact, assuming such compelling public importance that their resolution should not be entrusted to the Exchange's internal processes. We are at a loss to understand why Coenen, himself a professional in the se-

curities business, is so eager to embroil the courts in this dispute, and so reluctant to have his claim against a broker-dealer firm arising out of a securities transaction adjudicated by other such professionals.

Thus, neither the principal nor the alternative holdings of the Court of Appeals justify the grant of the petition. Nor is any question here presented (which would in any event be unique to Coenen's situation) as to "whether or not an exchange may lawfully require an applicant to waive his claims under the securities laws and antitrust laws as a condition precedent to membership" (Pet. p. 15). The decisions below do not require Coenen to relinquish any claims against anyone. They simply provide that, in accordance with the agreement knowingly made by him, his claims shall be adjudicated by a panel of arbitrators chosen pursuant to the Constitution and rules of the Exchange, rather than by the federal judiciary. As Judge Metzner observed (Pet. App. B, p. 7a), a different case would have been presented had Coenen chosen to commence litigation against Pressprich during the three-month period which intervened between the accrual of his cause of action and his admission to Exchange membership.

Coenen's astonishing statement that "the ruling is a *de facto* acquittal of one of two co-conspirators charged to have committed serious offenses under federal laws" (Pet. p. 17) can be interpreted only as an unwarranted slur on the integrity of the Exchange's arbitrators, or a realistic admission of the total lack of merit in his claims. In any event, having knowingly pledged to abide by the Constitution and rules of the Exchange, he cannot now belatedly complain of the alleged infirmities in its arbitration process. *Garfield & Co.* v. *Wiest*, 432 F.2d 849 (2d Cir. 1970), *cert. denied*, 401 U.S. 940 (1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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